SECTION 1813 OF THE ENERGY POLICY ACT OF 2005: IMPLICATIONS FOR TRIBAL SOVEREIGNTY TERRITORIAL MANAGEMENT, AND ECONOMIC SELF-SUFFICIENCY

PAUL E. FRYE
FRYE LAW FIRM, P.C.
ALBUQUERQUE, NM

INTRODUCTION

In Section 1813 of the Energy Policy Act of 2005 (the "2005 EPAct"), Congress directed that the Secretaries of Energy and Interior study four particular issues relevant to "Indian energy rights-of-way." This paper concentrates on one of those issues, "the tribal self-determination and sovereignty interests implicated by applications for the grant, expansion, or renewal of energy rights-o-way on tribal land." 2005 EPAct, § 1813(b)(3).

Under Article I, section 8 clause 3 of the United States Constitution, Congress has the power to regulate commerce with the Indian nations. Thus, this paper initially discusses Congressional treatment of rights-of-way, first from the perspective of property rights and second from a jurisdictional perspective. A discussion of the genesis of section 1813 itself and a brief summary of the general response of the Indian tribes to the study, as expressed initially and at the scoping meeting in Denver on March 7-8, 2006, follows.

The remainder of the paper identifies and explores the implications of Indian energy rights-of-way on tribal self-determination, self-sufficiency and sovereignty interests.

CONGRESSIONAL TREATMENT OF RIGHTS-OF-WAY: PROPERTY RIGHTS

Congress has enacted laws governing all types of rights-of-way across Indian lands. See 25 U.S.C. §§ 311-328. These statutes form a "comprehensive scheme which completely covers the subject of rights of way." Plains Elec. Gen. & Trans. Co-op v. Pueblo of Laguna, 542 F.2d 1375,

1380 (10th Cir. 1976); see United States v. Mitchell, 463 U.S. 206, 223 (1983). The policy behind the statutes is to protect Indian lands against "improvident grants of rights-of-way," Loring v. United States, 610 F.2d 649, 651 (9th Cir. 1979), to "fully . . . protect Indian interests," Southern Pac. Trans. Co. v. Watt, 700 F.2d 550,552 (9th Cir. 1983), cert. denied, 464 U.S. 960 (1983), and to "reflect a federal policy of avoiding or minimizing the disturbance of the Indian's quiet possession of the restricted domains they now occupy" to be implemented "consistent with the public interest in preserving the status of the . . . tribe as a 'quasi-sovereign nation.'" New Mexico Navajo Ranchers Ass'n v. ICC, 702 F.2d 227, 233 (D.C. Cir. 1983).

Congress has permitted condemnation of Indian allotted lands for certain rights-of-way in 25 U.S.C. § 357, but has not permitted condemnation of tribal trust lands, even by federal agencies. See United States v. Winnebago Tribe of Neb., 542 F.2d 1002 (8th Cir. 1976); United States v. 10.69 Acres of Land, 425 F.2d 317 (9th Cir. 1970); Bear v. United States, 611 F.Supp. 589, 599 (D. Neb. 1985), aff'd, 810 F.2d 153 (8th Cir. 1987). Moreover, when the Department of the Interior promulgated a proposed rule to eliminate the requirement of tribal consent for rights-of-way in certain instances (and in a situation where significant energy resources were at stake), Congress stepped in, studied the situation, and, in effect, directed the Department to rescind that part of the proposed rule. See "Disposal of Rights in Indian Tribal Lands without Tribal Consent," H. R. Rep. No. 91-78, 91st Cong. 1st Sess. 20 (1969) (the "House Report").

The House Report, after almost two years of study and communication with the Department of the Interior, concluded that the "Secretary's proposal for granting rights-of-way over tribal land without the consent of the tribe which owns it violates property rights, democratic principles and the pattern of modern Indian legislation" and that the Secretary's assertion of such power is "contrary

to law, as well as to good government, and should not be entertained." Id. at 3. The House Report quoted with favor the Bureau of Indian Affairs' opposition to the proposal, based in part on the fact that the consent requirement "has greatly enhanced the ability of unorganized [i.e., non-IRA] tribes to manage their own property and has strengthened their bargaining position with oil and gas pipeline companies, electric power companies, and other applicants for rights-of-way across their reservations." Id. at 8. The House Report noted the incongruity of the Secretary's proposal with modern federal policy, quoting President Johnson's message on Indian affairs which urged that the United States engage in "partnership – not paternalism," and that the United States "must affirm their right to freedom of choice and self-determination." Id. at 18.

The House Report's conclusions were based in large part on the principle of consent of the governed. See id. at 3, 17-19. That principle, although dishonored on many occasions, is the foundation of modern Indian legislation. See Richard B. Collins, Indian Consent to American Government, 31 Ariz. L. Rev. 365 (1989). Finally, the House Report observed that straying from the consent requirement would likely result in "protracted and costly litigation in the Court of Claims." House Report at 12.

Congress gave further protection for Indian nations in their property rights generally in the Quiet Title Act, which does not waive the United States' sovereign immunity in suits seeking to establish rights in Indian lands. See 28 U.S.C. § 2409a. Because the United States as holder of the fee title to such lands is an indispensable party in such cases, see Minnesota v. United States, 305 U.S. 382 (1939), those suits will be dismissed, see, e.g., State of Alaska v. Babbitt, 38 F.3d 1068, 1072-74 (9th Cir. 1994); Imperial Granite Co. v. Pala Band of Mission Indians, 940 F.2d 1269, 1272 n.4 (9th Cir. 1991) (Quiet Title Act poses an "insuperable hurdle" to a suit to establish title to an

easement across reservation land). Therefore, the court in United States v. Pend Orielle Pub. Util. Dist., 28 F.3d 1544 (9th Cir. 1994), cert. denied, 514 U.S. 1015 (1995), ruled that "[t]he Utility may not condemn tribal lands embraced in a reservation under the Power Act or any other federal statute." This is consistent with case law holding that a certificate of public convenience and necessity from the Federal Energy Regulatory Commission does not give the holder of the certificate the power to condemn federal lands in furtherance of its business activities. See Transwestern Pipeline Co. v. Kerr-McGee Corp., 492 F.2d 878, 883-84 (10th Cir. 1974), cert. dis'd, 419 U.S. 1097; see also Skokomish Indian Tribe v. United States, 410 F.3d 506, 512 n.4 (9th Cir. 2005) (en banc) (Indian tribe may seek damages and equitable relief for flooding of its reservation authorized by the Federal Power Act).

CONGRESSIONAL TREATMENT OF RIGHTS-OF-WAY: JURISDICTION

Congress also provided generally that rights-of-way passing through Indian reservations would retain their status as Indian country for criminal jurisdiction purposes. 18 U.S.C.§ 1151(a). Congress soon thereafter applied that definition to questions of civil jurisdiction. See DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975); California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 n.5 (1987). Congress specifically included such rights-of-way to correct the "absurd results" of Supreme Court cases that construed the 1834 definition. Richard B. Collins, Implied Limitations on the Territorial Jurisdiction of Indian Tribes, 54 Wash. L. Rev. 479, 527 (1979). The "absurd results" that Congress thought it corrected when it included reservation rights-of-way in the definition of Indian country was the jurisdictional uncertainty introduced by the Court related to rights-of-way. As explained by Professor Collins:

> The Court in Clairmont v. United States, 225 U.S. 651 (1912), voided a conviction on the ground that the offense occurred on a right-of-way to which the Indian title had been extinguished. A similar conviction was sustained in United States v. Soldana, 246 U.S. 530 (1918), on the ground that the right-of-way in question was not owned in fee simple by the grantee. Criminal convictions thus turned on the refinements of easement law.

Id. at 527 n.286. The modern Court reintroduced those absurdities in its dictum in Strate v. A-1 Contractors, 500 U.S. 438 (1997). In Strate, the Court overlooked Congress' definition of Indian country for territorial purposes, then attempted to apply the "refinements of easement law," and ultimately ran roughshod even over those refinements. See id. at 456 (negating tribal court civil jurisdiction in a case involving an accident between two non-members on a highway right-of-way where the grantee did not have fee simple title, and equating, or rather "align[ing] the right-of-way . . . with land alienated to non-Indians"). This dictum has spawned wholesale jurisdictional uncertainty in the lower courts, especially in the Ninth Circuit. See Smith v. Salish Kootenai College, 434 F.3d 1127 (9th Cir. 2006) (en banc) (affirming tribal court jurisdiction over accident involving college-owned truck on a public highway within reservation); Bugenig v. Hoopa Valley Tribe, 266 F.3d 1201 (9th Cir. 2001) (en banc) (Hoopa Tribe may regulate conduct of non-member on fee land within reservation), cert. denied, 535 U.S. 927 (2002); and compare Burlington Northern R. Co. v. Red Wolf, 196 F.3d 1059, 1062 (9th Cir. 1999) (no tribal court jurisdiction over a "tort claim arising from an accident on a right-of-way granted to a railroad by Congress"), cert. denied, 529 U.S. 1110 (2000); Big Horn County Elec. Co-op. v. Adams, 219 F.3d 944, 950-52 (9th Cir. 2000) (rejecting tribal taxes on utility property on easement granted by the Secretary of the Interior where right-of-way grant was equivalent of non-Indian fee land).

THE GENESIS OF SECTION 1813 OF THE 2005 ENERGY POLICY ACT

The Navajo Nation granted pipeline rights-of-way to the El Paso Natural Gas Company ("EPNG") in the 1950s and thereafter, all of which were to expire by their own terms on October 17, 2005. The EPNG system extends for almost 900 miles across the Navajo Reservation, and includes a number of lines of varying sizes from 30 to 42 inches in diameter capable of delivering 2.9 billion cubic feet of gas per day, and actually delivering about 2.5 billion cubic feet per day on average. As the expiration date approached without an agreement for renewal in sight, and as reports of compensation obtained by the Navajo Nation for other pipeline rights-of-way surfaced, the Navajo Nation learned that EPNG was pursuing a strategy designed to obtain renewal of its rights-of-way without Navajo Nation consent. EPNG had other problems, including the financial burden of its settlement with the State of California to resolve claims that the El Paso Corporation had manipulated energy markets in the California energy crisis, see Sacramento Business Journal (Mar. 21, 2003) (reporting that El Paso had settled California's claim for damages in the amount of $3.3 billion by agreeing to pay the State $1.7 billion), and by shareholders alleging that the El Paso Corporation had misrepresented its financial condition to their detriment by engaging in Enron-style wash trades, overstating reserves, providing risk-free investment opportunities to insiders, improperly reporting mark-to-market values, filing false financial statements, conducting and hiding off-balance sheet activities, failing to disclose material performance guarantees, and manipulating energy markets, see Wyatt v. El Paso Corp., No. CIV H-02-2717 (S.D. Tex).

On March 8, 2005, the New Mexico Oil and Gas Association ("NMOGA"), of which EPNG is a member, proposed amendments to the general Indian Right-of-Way Act, 25 U.S.C. §§ 323-28, that would allow the Secretary of the Interior to issue "a grant or renewal of a right-of-way, or

expansion of a right-of-way by amendment" over tribal land when the applicant and the tribe "cannot agree to the terms for the tribe's consent . . . ." "Proposed Revisions to 25 USC § 324," attached to letter from Bob Gallagher, President, NMOGA, to Senator Pete V. Domenici (March 8, 2005). The tribe would be allowed "just compensation" defined as the "fair market value of the rights granted, plus severance damages, if any, to the remaining estate, determined in accordance with generally accepted principles of property valuation."

Indian nations objected, and that proposal was not introduced by Senator Domenici or anyone else. On September 29, 2005, EPNG submitted a letter and legal analysis to Department of the Interior Solicitor Wooldridge, requesting that the Department grant the renewals over the Navajo Nation's objections. That submission urged that the Navajo Nation's Treaty of 1868 constituted the Nation's consent, that the Department's rule requiring consent of non-IRA tribes such as the Navajo Nation was unlawful, and that requiring Navajo consent was inconsistent with EPNG's rights under its FERC certificate.

Section 1813 of the Energy Policy Act of 2005 appears to be primarily the result of the above-described efforts to change the law governing rights-of-way over reservation land. The initial version required the Secretaries of Interior and Energy to examine only the proper standards and procedures for determining fair compensation for rights-of-way on tribal land and relevant national energy transportation policies relating to energy rights-of-way on tribal land. Other Senators, notably Senator Bingaman, viewed that focus as too limited, and the bill was expanded to include requirements that the study examine historic rates of compensation paid for energy rights-of-way on tribal land and an assessment of the tribal self-determination and sovereignty interests implicated by such rights-of-way. That expanded version eventually became section 1813.

RESPONSE OF TRIBAL REPRESENTATIVES TO SECTION 1813

The tribal response to section 1813 was swift and unequivocal. The National Congress of American Indians ("NCAI") recognized that "the language of section 1813 could be read to justify the Federal government overriding fundamental principles of tribal sovereignty and decision-making when they conflict with 'relevant national energy transportation policies.'" NCAI Res. #TUL-05-110 (Nov. 4, 2005) at 1. NCAI resolved to assist the Secretaries in the study "to fulfill the goals of section 1813 while preventing any erosion of tribal sovereignty or authority." Id. at 2.

More recently, on March 7-8, 2006, the Departments of Energy and Interior held a scoping session for the section 1813 study. The tribal presence and participation were impressive, and former Senator Ben Nighthorse Campbell set the tone of the meeting with opening remarks that outlined the genesis of the study and its incompatibility not just with modern federal policy generally, but also with the other provisions of the 2005 Energy Policy Act that deal with Indian energy resource development and that Senator Campbell himself authored.

Some of the comments may be found at http://1813.anl.gov/.

The comments ranged from those of EPNG, the Idaho Power Company and the Fair Access to Energy Coalition, a front for EPNG represented at the scoping session by EPNG's counsel, who were the most emphatic in urging that a real problem exists and may be appropriately fixed by federal legislation, to business owners who complained that energy bills were too high and who contended that unreasonable Indians must be the cause, to the Edison Electric Institute, whose members were sincerely concerned about the uncertainty of the terms under which rights-of-way for electric power lines could be renewed and which ultimately expressed a desire for dialogue with tribes. Other comments included those of Colorado politicians contacted by EPNG, which is

headquartered in Colorado Springs. A letter submitted by State Senator and Assistant Majority Leader Jim Isgar recommended that if the costs associated with the compensation by tribes for energy rights-of-way "are an insignificant percentage of overall consumer energy costs, we may very well conclude that the cultural value associated with preservation of tribal governments is worth that cost." The words used here, and the clear negative pregnant, reflect challenges that the Indian nations must overcome in engaging in an open dialogue with many elected officials.

Other industry comments presented a different picture than EPNG. Those industry representatives talked of the benefits of including Indian nations as partners, and urged that the present system encouraged and empowered the Indian nations to become actively involved in the energy production and transmission industry, to the ultimate benefit of the industry, the consumer and the country's energy security.

Presentations and comments of the Indian leaders and representatives predominated, and those comments were both persuasive and, in some cases, impassioned. Those comments focused on three items, principally: the unfairness of historic compensation levels for rights-of-way, the lack of any real present problem (except for EPNG's inability to come to terms with the Navajo Nation), and the potential implications for tribal sovereignty, self-determination and self-sufficiency of any "solution" to that "problem" which would allow any company or agency to avoid the tribes' fundamental right to exclude nonmembers and to condition the entry of those seeking to do business in the tribal territory.

The remainder of this paper examines that latter issue.

SECTION 1813'S IMPLICATIONS FOR FUNDAMENTAL TRIBAL RIGHTS

The objective of the proponents of the section 1813 study is to obtain rights-of-way (initial grants and renewals) over Indian tribal lands on terms to which the Indian nation does not consent. This effort implicates the following sovereign interests of the Indian nations: (1) treaty guarantees (for tribes with treaties), (2) the fundamental rights of an Indian nation to exclude nonmembers and the correlative right to condition the entry of nonmembers seeking to do business in the tribal territory, (3) regulatory, including tax, authority of Indian nations over nonmembers conducting business within the tribal territory pursuant to a grant of right-of-way, (4) tribal land use planning, (5) sanctity of contracts made with tribes and approved by the United States in the right-of-way context, (6) tribal rights to property (such as improvements) upon the expiration or other termination of a right-of-way easement, (7) jurisdictional stability and certainty, (8) the ability of Indian nations to develop the tribal economy and/or fund essential government services by taking advantage of business opportunities related to access over its lands or by obtaining maximum compensation for granting access to nonmembers, and (9) the continued adherence of the Congress to the policy favoring tribal self-determination and self-sufficiency or, alternatively, its drift to divestiture – implicit or otherwise – of fundamental tribal rights as inconsistent with the dependent status of Indian nations and the perceived interests of non-Indians. The following addresses these issues often with reference to the Navajo situation, but the issues and analysis will apply to Indian country generally.

1. Treaty Guarantees

Under the Constitution, treaties are the "supreme law of the land." U.S. Const., Art. VI. The United States has entered in many treaties with the Indian nations until treaty-making was abolished

in 1871. See Felix S. Cohen's Handbook of Federal Indian Law 127 (R. Strickland ed. 1982). Rights under these treaties are threatened by the proponents of the section 1813 study.

The foundation of the relationship between the Navajo Nation and the United States is a Treaty negotiated in 1849 and ratified by Congress in 1850. Under that Treaty, the Navajo submitted to the Government's "sole and exclusive right of regulating the trade and intercourse" with the Navajo. 9 Stat. 974. In exchange, the United States promised to give the Treaty a "liberal construction" and to "legislate and act as to secure the permanent prosperity and happiness" of the Navajo people. Id. at 975. These commitments indicate the Government's "willing assumption" of trust duties with respect to Navajo resources. See Jicarilla Apache Tribe v. Supron Energy Corp., 728 F.2d 1555, 1563 n.1 (10th Cir. 1984) (Seymour, J., concurring in part and dissenting in part), adopted as modified on other grounds, 782 F.2d 855 (en banc), supplemented, 793 F.2d 1171, cert. denied, 479 U.S. 970 (1986). The United States also promised to "at its earliest convenience, designate, settle, and adjust [the Navajos'] territorial boundaries, and pass and execute in their territory such laws as may be deemed conducive to the prosperity and happiness of said Indians." Id.

After subsequent skirmishes with local settlers and military authorities, the Navajo people were marched on the Long Walk to a concentration camp in eastern New Mexico. There, about one-third of the Navajos died, and the Government recognized the failure of that ignoble experiment. Consequently, a second treaty was negotiated and ratified in 1868. 15 Stat. 667. That Treaty designated an area of about 100 miles square to be "set apart for the use and occupation of the Navajo tribe of Indians" and further provided that the "United States agrees that no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employees of the

Government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over . . . the territory described" in the Treaty. Id., Art. II. The United States Supreme Court construed the 1868 Treaty in Williams v. Lee, 358 U.S. 217 (1959), as providing "that no one, except United States Government personnel, was to enter the reserved area." Id. at 221 The EPNG pipelines pass through this treaty reservation, as well as other lands set apart for exclusive Navajo use by later statutes and executive orders.

Article IX of the 1868 Treaty also provides that the Navajo will not "oppose the construction of railroads, wagon-roads, mail stations, or other works of utility or necessity which may be ordered or permitted by the laws of the United States." 15 Stat. at 668. Non-Indian entities, including EPNG, have contended that this promise constitutes advance tribal consent to their projects. However, treaties with Indian tribes must be construed as a whole, and, "[p]laced in context, it becomes clear that this portion of the Treaty was concerned with a cessation of armed hostility on the part of the Tribe . . . ." Kerr-McGee Corp. v. Navajo Tribe of Indians, 731 F.2d 597, 600 & n.2 (9th Cir. 1984), aff'd, 471 U.S. 195 (1985). This is consistent with the construction of similar provisions in treaties made with other tribes. See Bennett County, South Dakota v. United States, 394 F.2d 8, 15-16 (8th Cir. 1968); United States v. 2,005.32 Acres of Land, 160 F. Supp. 193 (D.S.D. 1958), vacated as moot, 259 F.2d 271 (8th Cir. 1958). Thus, the position of EPNG has been squarely rejected by the Secretary of the Interior, acting through the Interior Board of Indian Appeals. See Transwestern Pipeline Co. v. Acting Deputy Assistant Secretary – Indian Affairs (Operations), 12 IBIA 49 (1983); 43 C.F.R. § 4.1 (Office of Hearings and Appeals acts as an authorized representative of the Secretary).

Certainly, Congress has not interpreted the 1868 Treaty as either obviating the need for tribal consent or providing a blanket authorization for private or public entities, licensed or not, to occupy or use tribal lands. The treaty provision on which EPNG relies is present in numerous treaties with Indian nations, yet Congress has legislated to address specifically rights-of-way for highways, telephone lines and telegraph lines around 1900, 25 U.S.C. § 311, 319; railroads, telegraph and telephone lines and telegraph lines in 1899, 25 U.S.C. §§ 312-18; reservoirs or materials within reservations related to railroad construction and operation in 1909, 25 U.S.C. § 320; "the construction, operation, and maintenance of pipelines for the conveyance of oil and gas through any Indian reservation" in 1904, 25 U.S.C. § 321; and, ultimately, the 1948 Indian Right-of-Way Act, 25 U.S.C. §§ 323-28, relating to "rights-of-way for all purposes . . . over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes . . . ." Id., § 323. These laws "reflect a federal policy of avoiding or minimizing the disturbance of the Indian's quiet possession of the restricted domains they now occupy" and should be implemented "consistent with the public interest in preserving the status of the . . . tribe as a 'quasi-sovereign nation.'" New Mexico Navajo Ranchers Ass'n, 702 F.2d at 233. As the United States Department of Justice stated in opposing a similar effort by the Transwestern Pipeline Company, EPNG's interpretation of this treaty provision "is completely at odds with the central purpose of the 1868 Treaty which was to secure the benefits of peace and provide the Navajo Tribe with a 'permanent home' set apart from non-Indian settlers." Memorandum in Support of Motion for Partial Summary Judgment, Transwestern Pipeline Co. v. Clark, Nos. CIV 83-1884 and 84-0251 HB (D.N.M. Sept. 11, 1984).[1]

[1] In any event, applications submitted without evidence of tribal consent are not encompassed in the treaty provision upon which EPNG and others may rely. That provision refers to works of utility and necessity "ordered or permitted by the laws of the United States." Again, plagiarizing the

Decisions of the Court "have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. Williams v. Lee, 358 U.S. at 223, quoted in United States v. Mazurie, 419 U.S. 544, 558 (1975). The desire of EPNG and its allies to obtain a right of access through Indian lands without tribal consent threatens the currently recognized treaty rights of Indian nations.

2. Right to Exclude; Right to Condition Entry of Nonmembers; Right to Remove

The tribal right to control use of reservation lands is not reserved to treaty tribes. Congress confirmed pre-existing powers of Indian tribes in 1934, and those powers included the power to exclude nonmembers of the tribe from entering the reservations. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 141-44 (1982); Babbitt Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587, 592 (9th Cir. 1983), cert. denied, 466 U.S. 926 (1984); Powers of Indian Tribes, 55 Interior Dec. 14, 48 (1934). That power necessarily includes the ability to set conditions on the entry of nonmembers seeking to enter the reservation and conduct business there. Quechan Tribe of Indians v. Rowe, 531 F.2d 408, 411 (9th Cir. 1976); Ortiz-Barraza v. United States, 512 F.2d 1176, 1179 (9th Cir. 1975). "A tribe needs no grant of authority from the federal government in order to exercise this power." Ortiz-Barraza, supra.

Finally, the Indian nations have long been recognized as having the power to remove nonmembers who are not occupying tribal land under lawful authority. Powers of Indian Tribes, 55

Government's Memorandum in Transwestern freely, such a "pipeline is not 'ordered or permitted by the laws of the United States.' A certificate of public convenience and necessity issued by the FERC may indicate compliance with the laws administered by that agency, but not necessarily with laws administered by the other agencies including land management agencies of the Department of the Interior." Memorandum at 20-21; cf. 25 C.F.R. § 169.3(a) (2005) (requiring applications to include evidence of tribal consent).

Interior Dec. at 49. The power to remove is incidental to the "general power of a government as a landowner to remove intruders." Id., citing Canfield v. United States, 167 U.S. 518, 524 (1897). Obviously, persons occupying land past the term of their grants no longer operate under lawful authority, yet the proponents of the section 1813 study seek legislative dispensation to effectively deprive Indian nations of their ability to eject trespassers.

The present effort of EPNG and perhaps others to undermine the tribal consent requirement, for initial grants and renewals alike, therefore threatens the fundamental right of all tribes to exclude or remove nonmembers and to condition the entry of those seeking to do business within the tribal territory.

3. Regulatory Authority

The Supreme Court reversed the presumption of tribal civil and regulatory authority over nonmembers in Montana v. United States, 450 U.S. 544 (1981). The Court now presumes that Indian nations lack such authority with two exceptions: where there are qualifying "consensual relationships" between the Indian nation and the nonmember, and where the nonmember's conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Id. at 565-66. The courts are construing those exceptions narrowly in many instances.

If an Indian nation is unable to maintain its fundamental gate keeping function, either under a treaty or under its right to exclude, then the federal agency that is authorized to grant rights-of-way over tribal lands will not necessarily have any incentive to ensure that the rights-of-way it grants are conditioned on continuing tribal authority to regulate and tax. If a federal agency grants an easement without tribal consent and without such conditions under the authority of a federal statute, the

affected Indian nation may have severe difficulty in maintaining its authority to regulate and tax the entity that is conducting business on tribal land, because of the implications of Strate and its progeny and also because reliance on one of the two possible exceptions to the rule in Montana – a consensual relationship with the tribe – would be automatically foreclosed. The second Montana exception would be a slender reed to grasp in many cases. See, e.g., Burlington N. R. Co. v. Red Wolf, 196 F.3d 1059, 1064-65 (9th Cir. 1999) (second Montana exception is triggered only when the threat to the tribe's well-being is "demonstrably serious"; the threat or actuality of death or injuries to just a few tribal members is not enough).

Thus, any change to the present requirement of tribal consent as a condition to a grant of easement for right-of-way imperils the tribes' tax base, its related ability to provide the benefits of an organized society to its members and nonmembers alike, and its ability to protect the health, welfare and safety of the tribal community.

4. Tribal Land Use Planning

Modern congressional policy honoring inherent tribal sovereignty was effected in 1934 with the enactment of the Indian Reorganization Act, 25 U.S.C. § 461, et seq. ("IRA"). Section 16 of the IRA attempted to secure the preexisting powers of Indian tribes, and one subsection thereof is prefaced with the phrase "[i]n addition to all powers vested in any Indian tribe or tribal council by existing law . . . ." 25 U.S.C. § 476(e). The Interior Solicitor was asked to state what those powers were. See Powers of Indian Tribes, 55 Interior Dec. 14 (1934). Solicitor Margold did so, and those views regarding a statute to be administered by the Department are entitled to great weight. See Udall v. Tallman, 380 U.S. 1, 16 (1965); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 139, 146 n.12 (1982) (relying on Powers of Indian Tribes).

After an exhaustive examination of the case law, the Solicitor determined that "[i]t clearly appears, from the foregoing, cases, that the powers of an Indian tribe are not limited to such powers as it may exercise in its capacity as a landowner. In its capacity as a sovereign, and in the exercise of local self-government, it may exercise powers similar to those exercised by any State or nation in regulating the use and disposition of private property, save as it is restricted by specific statutes of Congress." Powers of Indian Tribes, 55 Interior Dec. at 55.

Zoning and land use planning are such typical governmental functions. These functions have special importance to Indian nations, whose central values may include a greater respect or reverence for land and sacred sites. The Supreme Court has recently recognized the power of Indian tribes to label and zone "closed" reservation land, without regard for county zoning ordinances. Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989). That power permits Indian nations to protect sacred places and other places of cultural significance – places that a federal administrator would likely not treat with any special care. See Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983).

Granting a federal agency the power to approve rights-of-way through reservation lands is inconsistent with the tribes' ability to withdraw lands for special purposes, such as parks. Elimination of the tribal consent requirement, with respect to the location of an easement or other terms and conditions of its use, would compromise the tribes' ability to exercise the fundamental governmental function of zoning and land use planning to protect the health and safety of its members and visitors, to promote an aesthetically pleasing environment for the community, and to protect places of religious or cultural significance.

5. Sanctity of Contract

Governments, including tribal governments, enter into contracts. Those contracts are interpreted under general contract law. United States v. Winstar Corp., 518 U.S. 839 (1996). The United States can be held liable for violating or impairing contract rights in the Court of Federal Claims under the Tucker Act and the "Indian Tucker Act," 28 U.S.C. §§ 1491, 1505; see Winstar.

Typically, right-of-way agreements with Indian nations are for a limited term of years. Many Indian nations are including provisions in such agreements to require the right-of-way grantee to leave peaceably at the termination of the right-of-way agreement, and these agreements may also provide that the tribe will become the owner of the improvements at that time. The Bureau of Indian Affairs requires that the right-of-way agreement be consistent with federal regulations in 25 C.F.R. Part 169, including the regulations that require tribal consent for any renewal of the right-of-way, and recent tribal agreements underscore that requirement by explicitly providing that there shall be no right or expectation of renewal.

Those industry proponents of changes to Indian right-of-way legislation often focus on the asserted public interest in allowing renewals of the grant over tribal objections. In cases where the right-of-way agreements call for a limited term, or require that the grantee leave peaceably on the expiration of the term, or provide that the improvements shall become the property of the tribe at that time, or provide that the grant is subject to the applicable regulations, any modification of the tribal consent requirement by the Congress would impair these contracts in violation of the Constitution, and would subject the tribes and industry alike to uncertainty because the sanctity of federally approved contracts in Indian country is not inviolate.

6. Property Rights

Powers of Indian Tribes, supra, notes that the "powers of an Indian tribe with respect to property derive from two sources. In the first place, the tribe has all the rights and powers of a property owner with respect to tribal property." Powers of Indian Tribes, 55 Interior Dec. at 50. If any legislation would permit rights-of-way over tribal land without consent and without just compensation, the United States would be liable for a taking. See generally United States v. Creek Nation, 295 U.S. 103 (1935) (conveyance of tribal property based on incorrect survey of tribal lands required "just compensation"; otherwise, conveyance "'would not be an exercise of guardianship, but an act of confiscation'") (quoting Lane v. Pueblo of Santa Rosa, 249 U.S. 110, 113 (1919). As the House Report states, "Tribal land is the property of the Indian tribe. It is not the property of the United States." House Report at 6 (footnote omitted).

In addition, as noted above, many Indian nations have property rights to the improvements constructed within rights-of-way on tribal lands upon the expiration or other termination of the grant. Some, including the Navajo Nation, have rights to compressor stations appurtenant to the pipeline right-of-way under the terms of business site leases executed by the parties and approved by the Department of the Interior under 25 U.S.C. § 415. Thus, any legislative action to, in effect, extend the term of rights-of-way without tribal consent would not only impair contracts, would also require a separate unconstitutional taking of tribal property.

As discussed below, the Indian nations are not acquiring these property interests simply to extract more money from pipeline or other companies in the renewal setting, although that is surely a legitimate interest. See House Report at 8. Rather, the acquisition of these improvements and facilities has been instrumental in the tribes' efforts to attain self-sufficient economies and to

increase production and transmission of energy resources from and through tribal lands for the benefit of the tribal community and the non-Indian public.

7. Jurisdictional Stability and Certainty

The preceding discussion of Congressional policy relating to Congress' inclusion of rights-of-way in the federal definition of "Indian country" for criminal and civil jurisdiction, and the judicial confusion and resulting uncertainty regarding jurisdiction over rights-of-way and those using them, is an issue that the Secretaries of Energy and Interior, in their capacities as trustee, should address. The study should recommend that Congress reassert its authority under Article I, section 8, clause 3 of the Constitution, and reaffirm that rights-of-way running through Indian reservations remain "Indian country" for criminal and civil jurisdiction purposes.

In addition, the effort of the industry proponents of section 1813 to dilute the tribal consent requirement of existing law threaten another longstanding congressional policy governing Indian affairs since at least 1934.

Congress has attempted to remedy or ameliorate the checkerboarding of land titles and jurisdiction resulting from the disastrous allotment policy. See Felix S. Cohen's Handbook of Federal Indian Law 136-38 (R. Strickland ed. 1982). After passing a variety of specific statutes intended to reestablish Indian title to "surplus" lands early in the 20th century,[2] Congress prohibited any further allotment of Indian reservation lands in section 1 of the Indian Reorganization Act, and that section applies to both IRA and non-IRA tribes. See, e.g., Begay v. Albers, 721 F.2d 1274, 1279-80 (10th Cir. 1983). It has attempted to foster tribal land consolidation in "opened" Indian

---

[2] See, e.g., Act of March 3, 1921, 41 Stat. 1225, 1239; Act of May 29, 1928, ch. 853, 45 Stat. 883, 899-900, construed in HRI, Inc. v. EPA, 198 F.3d 1224, 1251-554 (10th Cir. 2000).

reservations in general legislation such as the various iterations of Indian Land Consolidation Act, which permits the Indian nations to adopt land consolidation plans with the approval of the Secretary of the Interior. 25 U.S.C. § 2203. In addition, both Congress and the Executive Branch have continued to act to consolidate the tribal territory on a tribe-specific basis, using many different approaches, including use of section 206 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716. See, e.g., Act of Oct. 17, 1975, Pub. L. 94-114, 89 Stat. 577 (Submarginal Lands Act, conveying title to lands in trust for seventeen identified tribes); Act of Oct. 6, 1982, Pub. L. 97-287, 96 Stat. 1225 (authorizing exchange of land between the United States and the Navajo Nation); Public Land Order No. 2198, 25 Fed. Reg. 8546 (Sept. 3, 1960) (withdrawing 241,000 acres of land in checkerboard area for Navajo use); Notice of Realty Action, 47 Fed. Reg. 56,409 (1982) (announcing exchange of federal lands within Navajo Indian country for lands outside that area purchased by Navajo Nation); 57 Fed. Reg. 33,733 (Jul. 30, 1992) (announcing exchange of lands within Navajo checkerboard area).

Section 1813 of the Energy Policy Act of 2005 mandates a study of "Indian energy rights-of-way." The proponents of this section seek congressional sanction for avoiding tribal consent to the grant of easements for rights-of-way over tribal land. That result would exacerbate, rather than ameliorate, both the jurisdictional confusion and the checkerboarding problem in violation of longstanding congressional policy.

8. Economic Self-Sufficiency

The Navajo Nation was described a generation ago as an "energy colony" of the United States. U.S. Comm'n on Civil Rights, The Navajo Nation: An American Colony (1975). Other Indian nations have contributed to national energy security and the comfort of their non-Indian

neighbors, yet, like the Navajo, many tribal communities lack basic services such as electricity or natural gas service or running potable water in homes. Several Indian nations have recognized that access through and rights-of-way within tribal lands are valuable assets that can be leveraged to provide a foundation for a self-sustaining tribal economy. Doing so is consistent with federal policy generally, see California v. Cabazon Band of Mission Indians, 480 U.S. 202, 217-18 (1987), and with the energy policy of the United States, specifically. See Indian Tribal Energy Development and Self Determination Act of 2005, P. L. 109-58; Indian energy provisions of the1992 Energy Policy Act, codified at 25 U.S.C.A. §§ 3501-06 (2001) (providing, for example, in § 3503(a) federal assistance for tribal energy vertical integration projects "to assist Indian tribes in pursuing energy self-sufficiency [and] to increase development of the substantial energy resources located on such Indian reservations").

The Southern Ute Tribe recognized that outside developers were not aggressively developing the Tribe's natural gas resources, and that pipeline access was part of the problem. It used its power to consent to rights-of-way to obtain ownership of pipeline systems within the reservation, used its business acumen to establish its own gathering company (the Red Cedar Gathering Company), and charged that company with providing service to areas of the reservation where development had languished for lack of gas gathering infrastructure. As a result, the Southern Ute Tribe is producing more energy for the United States and has achieved a level of tribal economic self-sufficiency unheard of even a generation ago.

A right-of-way for crude oil gathering pipelines and a main transportation line serving two refineries located partly within the Navajo Nation expired several years ago. Because the Navajo Nation had the power to consent (or not) to a renewal, the Navajo Nation was able to engage in

negotiations with the owner of the refineries, plan for a smooth transition of ownership and operations of the pipelines to the Nation's wholly owned and federally chartered petroleum company the Navajo Nation Oil and Gas Company ("NNOGC"), and agree on fair tariffs to be submitted to FERC by NNOGC. That acquisition provided funds for further upstream development of oil and gas resources by NNOGC, and NNOGC, often with industry partners, has acquired producing (and typically neglected) oil properties within the reservation. The end result has been a reversal of the decline curves for these properties, more oil production for the United States, more revenues for the Navajo Nation to provide needed public services to its people, and stability and certainty for the refinery owner, a valued business partner.

Similar successes are being seen on other reservations, such as the Jicarilla Apache Nation and the Northern Ute Tribe. The opportunities for tribal self-sufficiency, development of tribal economies, and greater energy production from tribal lands result, in these cases, from the ability of the tribes to control land use, including rights-of-way. Any legislation to undermine that power would seriously compromise these important tribal and federal interests.

9. The Direction of Federal Indian Policy

The section 1813 study has the capability of providing crucial support for a continuation of the modern federal policy of tribal self-determination and self-sufficiency. It also could portend a return to the 19th century model of dishonor for the rights of tribes as sovereigns and landowners.

The House Report discussed above provides the starting point for this discussion. It found that dilution of the tribal consent requirement would be contrary to "property rights, democratic principles, . . . law, as well as to good government." House Report at 3. It also found that circumventing tribal consent would violate "the pattern of modern Indian legislation," id., relying

on the policy of honoring tribal self-determination, id. at 18.

Since the House Report was published in 1969, Congress and the Executive Branch have consistently reaffirmed and strengthened the policy of tribal self-determination, tribal self-sufficiency, and government-to-government respect. See, e.g., 25 U.S.C. §§ 450, 458aa; The American Indian – Message from the President of the United States, H. Doc. 272, 90th Cong., 2d Sess. 3-4 (1968); Special Message to Congress on Indian Affairs, 1970 Pub. Papers 564, 573; President's Statement on Indian Policy, 1983 Pub. Papers 96; Statement on Signing the Department of the Interior and Related Appropriations, 1991, 26 Weekly Comp. Pres. Doc. 1768 (1990); Exec. Order No. 13,175, Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67,249 (2000); see Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195, 200 (1985). Federal environmental laws, including the Safe Drinking Water Act, the Clean Air Act, and the Clean Water Act, provide that Indian nations may qualify for primacy in administration and enforcement under "Treatment as a State" provisions. See 71 Fed. Reg. 16,773 (Apr. 4, 2006)(announcing supplement to delegation to Navajo Nation under Clean Air Act).

The Energy Policy Act of 1992 continued and applied that policy to tribal energy resources, including specifically "the generation and transmission of electricity . . . [and] natural gas distribution," 25 U.S.C. § 3503(a)(2), and the development and enforcement of tribal laws and regulations regarding energy resources on Indian reservations, id., § 3504(a). The 2005 EPAct advanced that ball even further, with its provisions authorizing the Indian nations to control and develop their energy resources largely without federal supervision. Even more recently, on January 20, 2006, Secretary of Energy Bodman promulgated the "U.S. Department of Energy American Indian & Alaska Native Tribal Government Policy" which acknowledges the "most important

doctrine derived from this relationship [between the Indian nations and the federal government] is the trust responsibility of the United States to protect tribal sovereignty and self-determination . . ."

The notion that Indian rights-of-way regulations jeopardize interests of non-Indian consumers is a smokescreen. The proponents of the section 1813 study would reverse federal policy of respect for tribal self-determination – the only federal Indian policy that has ever worked – to serve narrow corporate interests.

CONCLUSION

The sovereignty and self-determination interests of the Indian nations on this matter is are both numerous and significant. We respectfully suggest that the section 1813 study inform Congress of those fundamental federal and tribal interests, and of the importance of preserving and strengthening them. Indeed, we believe that the section 1813 study should also recommend to Congress that it reassert its authority to define "Indian country" for jurisdictional purposed, reaffirm the definition in 18 U.S.C. § 1151(a), and correct the judiciary's wayward course in the Strate dictum and its progeny. Finally, we recommend that if Congress does seek to provide some relief to the industry and the energy consumer alike from unjustifiable burdens, Congress should override Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989), and prohibit State taxation of mineral development on reservation lands, as contemplated in the 1992 EPAct: to "develop proposals to address the dual taxation by Indian tribes and States of the extraction of mineral resources on Indian reservations." 25 U.S.C. § 3505(k)(1).

Congress may have passed section 1813 under the misconception that there is a problem with Indian energy rights-of-way that impacts consumers or national energy security. Obviously, the Indian nations are ameliorating energy problems with their industry partners, contributing to national

energy security. Tribal representatives should be able to show that the amounts paid by energy consumers attributable to Indian energy rights-of-way are insignificant, and that the true causes of the rise in energy bills include global supply and demand, consolidation of oil companies, abuse of marketing power by cartels, Enron-style market manipulation, extraordinary profit-taking, and even executive compensation. It is up to the Indian nations to make sure that the true story is delivered to Congress and that fundamental principles and government-to-government respect are honored.

* * * * *